UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman PABLO A. ASTACIO-PENA
United States Air Force

ACM 37401

30 April 2010

Sentence adjudged 22 November 2008 by GCM convened at McChord Air Force Base, Washington. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Judge:

A general court-martial composed of military judge alone convicted the appellant, contrary to his pleas, of one specification of possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and sentenced him to a bad-conduct discharge,

confinement for four months, and reduction to the lowest enlisted grade.[1] The convening authority approved the sentence adjudged and waived automatic forfeitures for a period of three months. The appellant assigns three errors: (1) the evidence is not legally and factually sufficient to support his conviction, (2) the delay in post-trial processing deprived him of a meaningful opportunity for clemency, and (3) the omission of deployment data in the staff judge advocate's recommendation (SJAR) prejudiced his opportunity for clemency. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Legal and Factual Sufficiency

The appellant argues that the evidence fails to show either knowing possession of the four child pornography images of which he was convicted or knowledge of the contraband nature of the images. Specifically, the appellant argues that since the images were found in generally inaccessible unallocated space on the broken hard drive of the appellant's computer, the evidence fails to show he had sufficient access to and control of the images to constitute possession. In the alternative, he argues that even if the evidence shows possession it still fails to show knowledge of the contraband nature of the images.

The military judge found that the appellant knowingly possessed four sexually explicit images of real children under the age of 18. In his special findings, the military judge rejected the appellant's claim that he did not knowingly possess the images, noting that receipt of child pornography was a "natural, foreseeable, and probable consequence" of the appellant's Internet search activities and further noting that the appellant's detailed recall of one of the images belied the appellant's testimony that his possession of child pornography was unknowing. The military judge "did not find credible" the appellant's testimony that he did not have any interest in real images of child pornography. For the reasons set forth below, we likewise find the evidence factually and legally sufficient to support the appellant's conviction of possession of child pornography.

We review the factual and legal sufficiency of an appellant's conviction de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In evaluating factual sufficiency we independently determine whether the evidence admitted at trial, considering that we have not personally observed the witnesses, convinces us beyond a reasonable doubt of the appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In evaluating legal sufficiency, on the other hand, we determine whether a reasonable factfinder could have found all the essential elements beyond a reasonable doubt based on the evidence presented and viewed in the light most favorable to the prosecution. *Id*. at 324-25 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[1] The military judge found the appellant not guilty of a second specification alleging possession of obscene material in the form of computer generated images of children engaged in sexually explicit acts.

After the appellant's wife reported to the Family Support Center that her husband was viewing child pornography, Special Agent (SA) PK of the Air Force Office of Special Investigations interviewed the appellant concerning the allegation. The appellant admitted receiving child pornography pop-ups about 50 percent of the time during his Internet browsing, but indicated that he would promptly delete the images. In a follow-up interview conducted after forensic analysis of the computer, the appellant provided a detailed description of one of the suspected child pornography images and admitted that ". . . one, maybe more" real images of children may exist on the hard drive. He described these additional images as showing "a little girl sitting in a chair" who was "probably masturbating."[2] When asked why he did not delete the child pornography image which he had described in detail, the appellant replied that he did not delete it because "he may [have] want[ed] it for later" and that he used the images of children for masturbation. The appellant acknowledged using his computer during the charged time.

A computer forensics expert, Mr. DL, examined the forensic copy of the appellant's hard drive. He discovered that the appellant had peer-to-peer software installed which permits the exchange of image files with other computers and that the appellant had turned off the adult filter to permit searching for any type of pornographic images including child pornography. In the unallocated space of the drive where deleted files reside, he found several suspect images including the four images which the military judge specifically found to be child pornography.

Once a file enters the unallocated space after being deleted it is generally inaccessible to the user, and Mr. DL could not determine when the files were deleted. One of the four child pornography files discovered in the unallocated space was a full size image and the other three were thumbnail images, which are smaller images that link to other websites. He explained that thumbnail images are not typically downloaded through peer-to-peer networks and, without a corresponding large image, do not indicate whether they were clicked on by the user or even viewed. Mr. DL testified that in his experience he has never seen child pornography thumbnail images contained on an adult pornography website.

Dr. RN testified as an expert in pediatrics and Tanner Staging, a method of evaluating the age of individuals based on developmental characteristics. He opined that the female in the full size image, Prosecution Exhibit 4, was less than 16 years of age. He could not commit to an age determination on the other three images which were found by the military judge to be child pornography, but stated that "they all appeared to be childlike." A defense medical expert in Tanner Staging, Dr. AR, expressed his opinion that the female in Prosecution Exhibit 4 "could be 18," but his assumption would be that she is under the age of 18 years.

[2] Two of the three additional images found by the military judge to be child pornography do, in fact, show a young nude female sitting on a chair with her legs apart.

The appellant testified that although he downloaded Prosecution Exhibit 4 from a peer-to-peer network while searching the phrase "brother/sister masturbation," he did not know the photograph was illegal until he viewed it and then he promptly deleted it. He denied telling SA PK that he kept the image to view later. Mr. DL testified that his analysis indicates this image file was not immediately deleted since the latest possible download date was 7 June 2004, making it highly unlikely the file would still be salvageable over three years later given the high usage of the computer.

Concerning the three thumbnail images found by the military judge to constitute knowing possession of child pornography, the appellant testified that he had not previously seen those images. He generally denied ever intentionally downloading or possessing child pornography but acknowledged that child pornography pop-up images would appear about 50 percent of the time while he was browsing the Internet. The military judge specifically found that the appellant's disclaimer of any interest in images of real children was not credible.

The evidence is factually and legally sufficient to support the appellant's conviction. First, the images themselves show persons who appear to be minors. Second, testimony of expert pediatricians corroborates that one was an actual minor and that the persons in the other three images "appeared to be childlike." Third, testimony of the computer forensic expert effectively rebuts the appellant's claim that he immediately deleted the large image which he admitted was child pornography. Fourth, like the military judge, we find incredible the appellant's claim that he is the victim of child pornography pop-up images flooding his computer half the time he was on-line—a problem which he chose to repeatedly endure. Fifth, when confronted with the allegations, the appellant himself described one child pornography image in remarkable detail, admitted that ". . . one, maybe more" other images of real children may exist on the hard drive, and described these additional images as showing "a little girl sitting in a chair" who was "probably masturbating." Sixth, the appellant's intent to knowingly possess child pornography is evident in his admission to SA PK that he viewed images of children, whether virtual or real, to masturbate; therefore, like the military judge, we do not find credible the appellant's assertion that he had no interest in images of real children. We find the evidence factually and legally sufficient to show beyond a reasonable doubt that the appellant knowingly possessed images of child pornography.

Delay in Post-Trial Processing

The appellant argues that unreasonable government delay in authenticating the record of trial deprived him of a meaningful opportunity for clemency. The appellant's general court-martial concluded on 22 November 2008, and his scheduled release date from confinement was 27 February 2009. On 19 February 2009, the appellant requested deferment of the remaining confinement on the basis that the government's delay in authenticating the record of trial deprived him of an opportunity for meaningful clemency

relief.[3] The government served a copy of the authenticated record of trial on the appellant on his release date, 27 February 2009. The convening authority acted on 10 March 2009, 109 days after trial.

We examine claims of post-trial processing delay de novo, and a presumption of unreasonable delay in post-trial processing applies when the convening authority does not take action within 120 days of trial. *United States v. Moreno*, 63 M.J. 129, 135, 142 (C.A.A.F. 2006). Clearly, no such presumption applies in the present case since the convening authority acted in less than 120 days. The court reporter's chronology details the actions taken to complete the record of trial and shows no unreasonable delay in the processing of the appellant's case. We further find that the appellant suffered no prejudice, particularly in light of the appellant's own statement in clemency that he was deprived of formal counseling opportunities in confinement because his sentence was "too short."

Omission of Foreign and Combat Service from the SJAR

The appellant asks that we set aside the action of the convening authority because the information provided by a personal data sheet (PDS) attached to the SJAR failed to fully note the appellant's foreign and combat service. The military judge noted this omission at trial, clarifying with the defense counsel that the appellant deployed to Qatar and Diego Garcia and that the four months in Qatar were considered combat service since he received hostile fire pay. Despite this corrective action by the military judge, the staff judge advocate used the erroneous PDS in his recommendation to the convening authority. Neither the appellant nor his defense counsel noted the omission in their response to the recommendation.

Errors or omissions in a SJAR are waived absent plain error. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). To prevail, the appellant must show plain and obvious error that materially prejudiced a substantial right. *Id*. Omission of the appellant's combat service from the PDS is clearly error, so we focus on the third prong of prejudice. Although the convening authority's vast power to grant clemency makes the threshold for prejudice low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Id.* at 436-37 (quoting *Kho*, 54 M.J. at 65). The appellant has not done so in this case.

The adjudged and approved sentence of four months of confinement and a bad-conduct discharge is substantially less than the maximum, which included confinement for 10 years and a dishonorable discharge. Considering the offense and the sentence, we

[3] We presume the appellant is speaking in terms of the length of confinement since any delay in authenticating the record of trial would have had no impact on an unexecuted punitive discharge.

are convinced that knowledge of the appellant's two deployments would have had no impact on the convening authority's action, particularly in light of the appellant's receipt of numerous administrative disciplinary actions to include one that references substandard performance while deployed. Further, neither the appellant nor his counsel even mentioned his deployments in their respective clemency petitions, underscoring the minimal significance of this information to the clemency process. We do not condone these inaccuracies in the post-trial recommendation, but we will not require a new action where the inaccuracy resulted in no possible prejudice.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court